

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
 FOR THE COUNTY OF YAVAPAI

2011 DEC -6 AM 9:59

SANDRA K MARKHAM, CLERK

STATE OF ARIZONA,

Plaintiff,

vs.

JAMES ARTHUR RAY,

Defendant.

Case No. V1300CR201080049

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
 BEFORE THE HONORABLE WARREN R. DARROW

AGGRAVATION TRIAL DAY TWO

JUNE 29, 2011

Camp Verde, Arizona

**ORIGINAL**

REPORTED BY  
 MINA G. HUNT  
 AZ CR NO. 50619  
 CA CSR NO. 8335

1 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
2 FOR THE COUNTY OF YAVAPAI  
3  
4 STATE OF ARIZONA, )  
5 Plaintiff, )  
6 vs ) Case No. V1300CR201080049  
7 JAMES ARTHUR RAY, )  
8 Defendant. )  
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15 BEFORE THE HONORABLE WARREN R. DARROW  
16 AGGRAVATION TRIAL DAY TWO  
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AZ CR NO. 50619  
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1 Proceedings had before the Honorable  
2 WARREN R. DARROW, Judge, taken on Wednesday,  
3 June 29, 2011, at Yavapai County Superior Court,  
4 Division Pro Tem B, 2840 North Commonwealth Drive,  
5 Camp Verde, Arizona, before Mina G. Hunt, Certified  
6 Reporter within and for the State of Arizona.  
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1 APPEARANCES OF COUNSEL:

2 For the Plaintiff:

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9 For the Defendant:

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1 P R O C E E D I N G S  
2 THE COURT: The record will show the presence  
3 of Mr. Ray, represented by Mr. Kelly, Ms. Seifter  
4 and Mr. Li. And the state is represented by  
5 Ms. Polk and Mr. Hughes.  
6

7 Ms. Polk, I believe the state rested.

8 MS. POLK: We did, Your Honor.

9 THE COURT: Mr. Kelly?

10 MR. KELLY: Your Honor, we have no witnesses.

11 THE COURT: Okay.

12 Are the parties ready to proceed with  
13 closing?

14 MS. POLK: I am, Your Honor.

15 THE COURT: You may proceed.

16 MS. POLK: Thank you.

17 THE COURT: The jury is all present including  
18 the two alternates.

19 Thank you, Ms. Polk. Please proceed when  
20 you're ready.

21 MS. POLK: Good morning, ladies and gentlemen.

22 JURY PANEL: Good morning.

23 MS. POLK: Follow the money. Why were the  
24 victims at Angel Valley and why did they do what

25 Mr. Ray urged them to do? The answer is follow the  
money. The key to understanding why pecuniary gain

1 is an aggravating circumstance for all three counts  
 2 is to understand what the defendant was selling.  
 3 He was selling a breakthrough experience  
 4 through an altered experience. And he  
 5 intentionally used heat to give his buyers that  
 6 altered experience, the conduct that caused the  
 7 death of the three victims.

8 So ask yourselves what was the defendant  
 9 selling, and how did he get the participants to do  
 10 what he urged them to do? As you heard in the  
 11 audio clips during the trial, Mr. Ray marketed and  
 12 sold the keys to physical, emotional, spiritual,  
 13 financial, and relationship success. And his  
 14 extreme-heat event was the culminating event of the  
 15 week.

16 From beginning to end this was all about  
 17 money. So follow the money. The defendant was  
 18 paid \$10,000 per person. And in exchange he  
 19 delivered five days of exercises, the culminating  
 20 event of which was the heat-endurance challenge.  
 21 And he used the fact that participants had paid  
 22 these large sums of money to get them to follow his  
 23 directions to play full on --

24 MR. KELLY: Your Honor, I have to object.  
 25 Misstatement of facts. There is no evidence that

1 my client received any money in this case. May we  
 2 approach?

3 THE COURT: I'll sustain the objection.  
 4 Sustain the objection.

5 MS. POLK: And ultimately to stay inside that  
 6 superheated tent. Mr. Ray, as you learned through  
 7 Exhibit 809, is the president, the secretary, the  
 8 treasurer, the director; and he signed the annual  
 9 filing on August 7, 2009, for James Ray  
 10 International.

11 Exhibit 138 is one of the brochures  
 12 advertising the Spiritual Warrior 2009 event. You  
 13 learned that participants were charged just short  
 14 of \$10,000 for this five-day event. And you  
 15 learned that that \$10,000 did not include the cost  
 16 for room and board. That's \$10,000 for five days.

17 Mr. Ray designed his event to make the  
 18 participants believe they had gotten something of  
 19 tremendous value for the tremendous amount of money  
 20 that they paid. He profited from his willingness  
 21 to conduct an extreme event --

22 MR. KELLY: Your Honor, objection. May we  
 23 approach? Judge, there is no evidence that my  
 24 client profited --

25 THE COURT: Mr. Kelly, you may approach.

1 (Sidebar conference.)

2 MR. KELLY: Judge, I move for a mistrial on  
 3 the pecuniary gain factor and ask that it be  
 4 stricken and not considered by this jury, given the  
 5 prosecutor's willful misstatement of the facts. I  
 6 can make an offer of proof that actually JRI was in  
 7 debt \$1.3 million in 2009, and there is no profit.

8 THE COURT: Mr. Kelly --

9 Ms. Polk, I won't say anything until you  
 10 respond.

11 MS. POLK: Your Honor, this is the same  
 12 argument we had yesterday. There is circumstantial  
 13 evidence -- there is direct evidence as to the  
 14 amount that the participants paid. There is direct  
 15 evidence that Mr. Ray is JRI. And there is direct  
 16 evidence that 10,000 -- short of a half million  
 17 dollars went to the organization that is James Ray  
 18 International.

19 Mr. Kelly can argue somehow that there is  
 20 a separation between the defendant and JRI, but  
 21 that is not what the evidence is.

22 MR. KELLY: Judge, I don't have a problem with  
 23 that recitation of the evidence. I have a problem  
 24 with what Ms. Polk told this jury, that my client  
 25 profited.

1 MS. POLK: Your Honor, there is circumstantial  
 2 evidence that he profited. There is direct  
 3 evidence that he profited.

4 THE COURT: One thing I was going to say,  
 5 Mr. Kelly, is obviously someone can be in debt and  
 6 still profit. You know, that's not the question of  
 7 whether or not someone -- in the sense of making a  
 8 benefit, I guess, is a better word than saying  
 9 "profit," if you're looking at how that's  
 10 normally -- but being in debt doesn't mean that.

11 There is a whole issue here, and I didn't  
 12 go into it when I discussed the ruling on the  
 13 Rule 20 yesterday. There is this concept, piercing  
 14 the corporate veil, that you get in civil matters  
 15 that is here in some fashion.

16 But go ahead, Mr. Kelly.

17 MR. KELLY: Judge, I just want to make a  
 18 record. We requested a vicarious liability  
 19 instruction, which was rejected by the Court, for  
 20 this purpose.

21 THE COURT: I want to make the record clear on  
 22 that. I would give -- I thought a complete  
 23 vicarious liability instruction that included the  
 24 305, 306, was absolutely appropriate. If it wasn't  
 25 going to come in that fashion, then the instruction

1 did cover it has to be his direct conduct.

2 And there is the other thing talking  
3 about not being responsible for others. So the  
4 defense rejected my neutral instruction, wanted one  
5 just indicating a vicarious liability without  
6 addressing the other aspect of a person can be  
7 responsible for his or her actions regardless of  
8 whether or not the person happens to work for an  
9 entity. So that's what was discussed with regard  
10 to that.

11 MR. KELLY: Your Honor, what I would ask is a  
12 continuing objection in regards to conclusions as  
13 to whether Mr. Ray received any type of a financial  
14 benefit, based on the total lack of evidence, as I  
15 indicated during the Rule 20 argument. And I'd ask  
16 there be a continuing of that objection so I do not  
17 have to interrupt Ms. Polk's argument.

18 THE COURT: I don't know of a judge that's  
19 really granted a continuing objection other than  
20 when there is a pretrial ruling that's been  
21 discussed. And then there can be -- it's been  
22 ruled on. And there is still some unclear law as  
23 to whether or not the person should restate an  
24 objection anyway. But I think there is some recent  
25 case law that says once there is a prior ruling --

10

1 pretrial ruling, a person should not have to stand  
2 up and make repeated objections. So you've made --

3 Ms. Polk, it's been this case thorough  
4 this trial of making the distinction between what  
5 is the evidence -- what is the evidence and what  
6 is -- to say it's got to be in the form of  
7 argument. The distinction between a reasonable  
8 inference and speculation is something that would  
9 be very troubling -- what's speculation? What's a  
10 reasonable inference? You can argue the evidence.

11 But to say conclusively the evidence that  
12 he got the money, there isn't any evidence other  
13 than this piercing the corporate veil aspect that's  
14 come through but the testimony and the exhibits.

15 So, Mr. Kelly, if you need an objection.  
16 It's unfortunate to have objections, I understand,  
17 in this case. It's been -- the whole case has gone  
18 this way. But I'm not going to give a continuing  
19 objection.

20 Ms. Polk, argue from the evidence. Argue  
21 from the evidence.

22 MS. POLK: And, Your Honor, can I ask that  
23 Mr. Kelly not make speaking objections.

24 THE COURT: That's why we're here. Yes. All  
25 that can be stated is the objection, the legal

1 grounds.

2 MR. KELLY: Can I ask that the state of  
3 Arizona not improperly argue the evidence, and I  
4 won't have to object, Judge.

5 MS. POLK: Your Honor, I just want to clarify.  
6 Based on the evidence, it is the state's belief  
7 that the jury can conclude that Mr. Ray profited  
8 from this week. And there has been no evidence to  
9 suggest otherwise. What the jury knows is he got  
10 \$10,000 per person.

11 MR. KELLY: He didn't. JRI did.

12 MS. POLK: JRI got \$10,000 per person. And  
13 from that I can argue that Mr. Ray profited.

14 THE COURT: You can argue what the evidence  
15 may show. That's what can be argued.

16 MS. POLK: Thank you.

17 THE COURT: Thank you.

18 (End of sidebar conference.)

19 THE COURT: Ms. Polk, I want to talk just  
20 briefly to the jury.

21 Ladies and gentlemen, there have been a  
22 number of times I've mentioned this during the  
23 trial. But, again, as with the prior closing  
24 argument, opening statements, what the lawyers say  
25 is not the evidence. You decide issues relating to

12

1 the evidence based on your recollection of what the  
2 evidence actually was as you perceived it.

3 So, again, what the lawyers say is not  
4 evidence. This is argument that may assist you in  
5 understanding the law and the evidence.

6 Thank you.

7 Ms. Polk, you may continue.

8 MS. POLK: Thank you.

9 I'm just going to back up a little bit  
10 ladies and gentlemen, again, to Exhibit 809, which  
11 is the annual list of officers for James Ray  
12 International for 2009. From that exhibit you  
13 learned that Mr. Ray is the president. He is the  
14 secretary. He is the treasurer. He is the  
15 director of James Ray International and that he  
16 signed the annual filing on August 27, 2009.

17 From both direct evidence in this case as  
18 well as circumstantial evidence in this case, you  
19 can conclude that Mr. Ray is JRI. And you can  
20 conclude that Mr. Ray through JRI profited from his  
21 willingness to conduct an extreme event, to use  
22 extreme heat to cause participants to experience  
23 this altered state, to believe they had a  
24 breakthrough, and to believe that they had received  
25 something of value for their money.

1 The evidence in this case, both direct  
2 and circumstantial, has shown that Mr. Ray through  
3 James Ray International profited as a direct result  
4 of his conduct and clearly hoped to continue to  
5 profit by offering this extreme event, his  
6 breakthroughs, at future events.

7 During this trial you have heard  
8 Mr. Ray's own words from Sunday, the first day of  
9 the seminar, when he told the participants that  
10 altered states were empirically demonstrated to  
11 assist participants to evolve onward and upward and  
12 that they would have many altered states during the  
13 week.

14 (Audio played.)

15 MS. POLK: You heard also on Sunday through  
16 Mr. Ray's own words how he urged participants to  
17 play full on, to get their money's worth and how he  
18 promised them if they played full on, they would  
19 have a breakthrough.

20 And in this audio he also reminds them  
21 that this is what they paid \$10,000 for. Again,  
22 his words from Sunday.

23 (Audio played.)

24 MR. KELLY: Your Honor, objection. I would  
25 like to approach.

1 THE COURT: Ms. Polk, I'm going to ask that  
2 you stop the audio.

3 Mr. Kelly, Ms. Polk, approach.

4 (Sidebar conference.)

5 MR. KELLY: This is not in evidence.

6 MS. POLK: This is in evidence.

7 THE COURT: It is or it isn't?

8 MS. POLK: It is, Your Honor. I checked the  
9 exhibit list. It's in evidence. And have you  
10 looked at your exhibit list?

11 MR. KELLY: If it is, it's a mistake. It's  
12 never been played in front of this jury. I've  
13 never heard it. I'd move for a mistrial.

14 THE COURT: I don't recall hearing that.

15 MS. POLK: Your Honor, it was played in my  
16 opening. And then I moved to admit all those  
17 audios, and it was admitted at the beginning of  
18 trial.

19 MR. KELLY: We need to take a break, Judge.  
20 This is a serious problem.

21 MS. POLK: This is evidence that was admitted  
22 at trial.

23 THE COURT: If it's admitted at trial, then  
24 it's admitted. If it's not admitted, then it's  
25 right into a mistrial.

1 MS. POLK: Let me get you the exhibit list,  
2 then.

3 MR. KELLY: Judge, if this has been admitted  
4 and it's going to be played to this jury, I have  
5 violated my client's confrontation rights. We have  
6 a mistrial. Mr. Ray needs a new jury.

7 MS. POLK: Your Honor, I'll show you the  
8 exhibit list.

9 MR. KELLY: If somehow surreptitiously it was  
10 admitted in a bulk of exhibits.

11 (End of sidebar conference.)

12 THE COURT: Ladies and gentlemen, please be  
13 seated.

14 Ladies and gentlemen, we'll be taking a  
15 recess right now for a few minutes. Remember the  
16 admonition, all aspects. I know you have that.  
17 Thank you again for your strict adherence to that.

18 We will take a recess. It will be about  
19 15 minutes.

20 The parties will remain, please.

21 Thank you.

22 (Proceedings continued outside presence  
23 of jury.)

24 THE COURT: Please be seated. Going on the  
25 bench here. Mr. Kelly is asserting that evidence

1 that was just played, that was never admitted, it  
2 was not admitted as evidence. Ms. Polk indicates  
3 that it was.

4 This goes all the way back to opening  
5 statements, March 1 -- March 1. And Ms. Polk is  
6 making her opening statement. And there were  
7 various audio clips played that I said at the time  
8 it's very unusual to have evidence presented before  
9 it's admitted. But it happened. And there wasn't  
10 an objection, and that's what happened. And  
11 Ms. Polk is indicating that that evidence later got  
12 admitted.

13 I recall that bench conference and  
14 commenting that it appeared to me that because of  
15 the nature of what was played, ultimately it would  
16 be admissible. I don't recall saying it was. But  
17 I could see that it was a -- arguably a statement  
18 of a party and could be admitted. I remember  
19 making that comment.

20 It came up in a context with Mr. Li  
21 wanting to play the -- the -- what's been called  
22 the "EMT clip." I think that's when the issue got  
23 joined.

24 But, Ms. Polk, you represented to this  
25 court that, in fact, those exhibits were admitted.

1 Mr. Kelly does not believe they have been.

2 MS. POLK: Your Honor, they were admitted on  
3 March 2, 2011. And it is Exhibit 734.

4 THE COURT: Mr. Kelly.

5 MR. KELLY: Judge, again, of course, I'm  
6 thinking back some four and a half months now. But  
7 what I recall the representation from the State of  
8 Arizona -- and Mr. Li gave the opening and perhaps  
9 has a better recollection as to what happened.  
10 There was a representation that the audio clips  
11 played by the state during its opening were put  
12 together and marked as an exhibit. And as -- based  
13 on that representation, there was not an objection  
14 to the audio clips which were played during  
15 opening.

16 I have never heard the last audio clip.  
17 That's my recollection. Now, I -- it's serious  
18 enough, Judge, as I mentioned -- if somehow now  
19 unbeknownst to Mr. Li and I a piece of evidence has  
20 been admitted in this case, there is two issues at  
21 play. One is the representation from the state  
22 whether it was correct. And the second is our  
23 competency as counsel. So it's a serious issue.  
24 And it's more than just sitting here and allowing  
25 them to be played in front of this jury.

1 And I simply do not have any recollection  
2 of that audiotope being played in the opening  
3 statement or any portion throughout this trial.

4 THE COURT: I'm going to find out about that.

5 Ms. Polk, are you saying these were all  
6 played in opening?

7 MS. POLK: Your Honor, they were. And then  
8 some of them were played again -- again in the  
9 early months of the trial. And Mr. -- I don't  
10 agree with Mr. Kelly's recollection at all.  
11 Through the early witnesses the state then began  
12 playing some of the audio clips. We worked back  
13 and forth with the defense, and ultimately they  
14 agreed to certain limited audio clips being  
15 admitted.

16 The state had moved to admit the entire  
17 audio from the week. The defense never would agree  
18 to that. But each of these audios I am playing  
19 have been admitted. And some of them actually were  
20 played through the early witnesses. Not every  
21 single one. Every single one was either played,  
22 Your Honor, in the opening and/or played through  
23 earlier witnesses.

24 MR. KELLY: And, Judge, if that's the case,  
25 they're admitted and they've been played, I have no

1 objection. But it's -- perhaps Mr. Li has a better  
2 recollection. But I don't recall this audio clip  
3 being played.

4 THE COURT: Mr. Li.

5 MR. LI: Your Honor, for the record, my  
6 recollection is that the issue that the Court has  
7 just mentioned about audiotapes being played was  
8 mentioned during the opening statements. We did  
9 have a bench conference.

10 I believe the Court's remedy to that  
11 was -- or not remedy. But just to make sure that  
12 the record was complete was to ask the parties to  
13 make copies of everything that was played or used  
14 in the opening statement. The parties complied  
15 with that.

16 Then my recollection is throughout the  
17 rest of the trial, the state and the defense had  
18 this ongoing back and forth about which clips could  
19 actually be played and admitted. And I think the  
20 Court will recall the defense complaining a lot  
21 about being given clips at the end of the evening  
22 and then having to deal with them and then decide  
23 whether they're relevant, whether they impact First  
24 Amendment issues. There was a whole series of  
25 litigation.

1 I do not think it was the case,  
2 Your Honor, that on March 2 the parties stipulated  
3 that a CD of tapes would be admitted into evidence  
4 without foundation, without any sort of discussion  
5 about the First Amendment issues that we had  
6 raised, without any discussion about all the other  
7 pending issues that we raised for the first month  
8 and a half of the trial.

9 I'll remind the Court of a significant  
10 amount of litigation back and forth about how much  
11 of a tape could be played, whether that particular  
12 tape could be played, for what purpose it could be  
13 played, all of those sorts of things. So I'm --  
14 you know -- I can't speak -- I don't have a  
15 specific recollection of hearing that tape.

16 THE COURT: Well, I've got a minute entry,  
17 March 2, 2011, at 1:35 p.m. At sidebar Exhibit 734  
18 is offered and admitted into evidence without  
19 objection. That's what the minute entry says.  
20 734 is offered and admitted into evidence without  
21 objection.

22 MR. KELLY: And, Your Honor, that's one day  
23 after the opening statement. And the  
24 representation was that 734 was a CD containing the  
25 audiotapes played during Ms. Polk's opening. That

1 clip was not played.

2 MS. POLK: And, Your Honor, if I can respond  
3 to that. These clips were played. And I would  
4 just remind the Court that this issue, the issue of  
5 using Mr. Ray's audio, Mr. Ray's own words, was an  
6 issue that we litigated. We litigated at first in  
7 order to get the audio. And then the defendants  
8 had -- the defense had done a motion to preclude  
9 the state from using the audio. And we litigated  
10 that issue. And this court ruled that it would be  
11 admissible, that it's his own words. That it is an  
12 exception to the hearsay rule.

13 You ruled prior to trial that it would be  
14 admissible. And then the various clips that I'm  
15 playing now were admitted either on March 2 -- I'm  
16 going to play some additional clips that were  
17 and -- see if I can pull 745, which was admitted on  
18 March 8; 744, which was admitted on March 8; and  
19 then 734, which we have discussed.

20 All of this evidence has been admitted,  
21 Your Honor. And this interruptions and this  
22 claiming that they don't remember that it was  
23 played, there is just no basis for that. This has  
24 all been admitted. I'm able in the aggravation  
25 hearing to use evidence that has been admitted at

1 the trial phase. And, again, these are the  
2 defendant's own words, very relevant to the issue  
3 of pecuniary gain.

4 MR. KELLY: Judge, if there was a  
5 misrepresentation or a misunderstanding that  
6 Exhibit 734 contained the audio clips played in  
7 Ms. Polk's opening statement, that's the issue.  
8 Now, I don't recall ever hearing that clip.  
9 Neither does Mr. Li.

10 Of course, you were here for every minute  
11 of this trial. I don't know what your recollection  
12 is.

13 But this is a serious problem if now  
14 somehow unbeknownst to the defense we have portions  
15 of a tape that have not been confronted or subject  
16 to cross-examination or questioned throughout the  
17 course of trial that are going to be used against  
18 my client. That's the issue. And if it was  
19 intentional or mistaken is irrelevant.

20 What the issue is here is what is the  
21 evidence that was intended to be admitted during  
22 this trial? And my recollection was on the day  
23 after the opening statement, you had asked for  
24 audio clips of the opening to be prepared and  
25 submitted to this court. That's my recollection.

1 And I don't recall that last clip.

2 MR. LI: Your Honor, just for the record,  
3 there have been other exhibits prepared by the  
4 state that are compilation exhibits that have  
5 included documents that were not admitted. For  
6 instance, the medical records that had Daniel P.'s  
7 information in it.

8 And I'm not saying it's intentional or  
9 anything, but we have had situations where blocks  
10 of evidence have been submitted, and it's only  
11 through -- you know -- literally going through each  
12 item that is stuck on a CD that we've been able to  
13 identify specific pieces of evidence that were or  
14 were not appropriately subject to admission. And  
15 this court did strike at least one exhibit because  
16 of that.

17 MS. POLK: And, Your Honor, I'd like to  
18 respond to that. Because what Mr. Li is referring  
19 to is the CD of medical records that we had  
20 prepared for Dr. Dickson. From the stand Ms. Do  
21 took it and then moved to admit all of it, and then  
22 later learned that it had things on it that the  
23 defense did not want in. That's the situation  
24 Mr. Li is talking about. There has been no other  
25 compilation. If I may finish.

1 MR. LI: That's not correct.

2 THE COURT: We're going to speak one at a  
3 time.

4 Please, Ms. Polk.

5 MS. POLK: This suggestion that somehow there  
6 has been other compilations of things that should  
7 not be in -- and I just want to back up again.  
8 This is an issue we litigated prior to trial, the  
9 admissibility of Mr. Ray's words on the audio. And  
10 this court had thoroughly briefed it. This court  
11 had appropriately ruled it's an exception to the  
12 hearsay rule.

13 And then at trial I used these audios  
14 either in my opening or through witnesses. And  
15 they've all been properly admitted. The exhibit  
16 list and the minute entries will show they've all  
17 been properly admitted.

18 Mr. Li is recalling two separate things.  
19 The first is that after Mr. Li's opening, I had  
20 requested that the state's and the defense openings  
21 be submitted on CDs for the record because there is  
22 no record of what happens in the opening. So  
23 that's what we did.

24 But separate from that, then, I had moved  
25 to admit the various audios. And, in fact, it is

1 reflected on that minute entry on the 2nd. That's  
2 when 734 came in and then on March 8 when these  
3 additional exhibits came in.

4 It's completely appropriate, Your Honor,  
5 for the state to use this in our argument on this  
6 pecuniary gain factor.

7 MR. LI: Your Honor, if I may?

8 THE COURT: Yes, Mr. Li.

9 MR. LI: I apologize for interrupting also.

10 Exhibit 257 is a medical record that  
11 was -- I agree it was not part of a CD compilation.  
12 But it was a mass admission of documents.  
13 Exhibit 257 is Daniel P.'s medical records. It was  
14 admitted on 5/10/2010. It was ordered stricken  
15 because it was admitted by mistake as part of a  
16 mass admission.

17 The problem that we have here,  
18 Your Honor, and I will try to bring this court back  
19 four and a half months ago, is that what the state  
20 had done was clipped 109 at least different  
21 audiotapes and just simply wanted to admit them en  
22 masse.

23 And we had objected, and the Court had  
24 said well, you guys have to figure out a way to  
25 deal with this. And the way we ended up dealing

1 with it is on a clip-by-clip basis.

2 I do not recall hearing this particular  
3 tape being played. I simply don't. And perhaps  
4 the Court has a different recollection but -- and  
5 if the Court does, we'll stand corrected.

6 THE COURT: I can't say.

7 MR. LI: So the problem here is -- I will  
8 represent to the Court, we received from the state  
9 109 different clips. And it might have been more  
10 when it had first started off. And I believe the  
11 Court will recall our various complaints to the  
12 Court where I was telling the Court, hey, I'm  
13 sorry. I don't mean to whine, but we have been  
14 literally given this mass of information, and  
15 they're asking us to sort it out.

16 THE COURT: I do recall at one point,  
17 Ms. Polk, you were suggesting admitting hours and  
18 hours of audio. And I indicated in my experience  
19 I'd never seen something been admitted that goes to  
20 the jury that I haven't had a review of, there has  
21 been an objection to and the defense objected.  
22 Then that didn't happen. This is an issue somewhat  
23 along those lines.

24 It's going to come down to if it was  
25 admitted. That's what it's going to come down to.

1 And, Ms. Polk, you're saying it is,  
2 obviously. If this evidence goes to the jury and  
3 it hasn't been played, you know the implications  
4 for this phase.

5 MS. POLK: I do.

6 THE COURT: This phase completely.

7 The other thing too is the cases are  
8 closed. Other evidence could have been offered  
9 during this phase. It's another chance to put  
10 evidence in. And that wasn't done. And that would  
11 have been a chance to have looked at this. If it  
12 was going to be duplicated, then I imagine there  
13 would be an objection on that basis.

14 But, as the defense asserts, they don't  
15 believe it was even admitted, although the minute  
16 entry indicates to the contrary, then that would  
17 have been addressed in that fashion.

18 Mr. Kelly.

19 MR. KELLY: Your Honor, I would simply again  
20 make another offer of proof that based on my  
21 recollection, as well as cocounsel in this case,  
22 during the opening statement of Ms. Polk, this  
23 particular audio clip was not played to this jury.  
24 We did not have any knowledge that it was contained  
25 on the CD for the reasons articulated by Mr. Li.

1 And it raises significant issues in  
2 regards to the fairness of the proceeding, that I  
3 would submit, with all due respect, is the  
4 obligation of the Court as well as the State of  
5 Arizona to ensure that my client receives a fair  
6 trial. That's what we're trying to do.

7 We did not, based on my recollection and  
8 Mr. Li's, have the opportunity to present evidence,  
9 confront or cross-examination the words that have  
10 just been played to the jury.

11 I think what's clear, Judge, the  
12 agreement is that the audio clips played by  
13 Ms. Polk on March 1 were to be admitted. That's  
14 true, and that is not in dispute.

15 The audio clips which were either  
16 admitted by stipulation or over the objection of  
17 the defense throughout various witnesses is agreed  
18 upon that they are admitted in this case.

19 What is not admitted or what is not  
20 agreed upon or ordered by this court was an audio  
21 clip was that no one had ever heard before. And  
22 therein lies the issue. And thank you for the  
23 opportunity to make a record.

24 MS. POLK: Your Honor, I'll just reiterate  
25 that these are admitted exhibits, that they were

1 played during the state's opening or through the  
2 testimony of some of the witnesses. They've all  
3 been played at some point for the jury. And they  
4 are admitted.

5 And counsel's avowal based on a memory  
6 from several months ago should simply not get in  
7 the way of allowing the state to proceed with  
8 admitted evidence in the closing argument.

9 MR. LI: Just for the record, Your Honor,  
10 Exhibit 257 is instructed. That exhibit was  
11 admitted. And that's Daniel P.'s medical records.  
12 And it's not part of the compilation of the CD.  
13 It's literally just his medical records. They were  
14 admitted. And it's only because of the defense's  
15 diligence going through the exhibit list trying to  
16 figure out what should and shouldn't have been  
17 admitted.

18 And our recollection that that particular  
19 exhibit had not and should not have been admitted,  
20 that that error was caught. Had the defense not  
21 actually done it, it would have just gone back to  
22 the jury. And so I'm not -- again, I cannot tell  
23 you I have a recollection of hearing that  
24 particular exhibit being played. I also -- you  
25 know -- I would defer to the Court's recollection

1 as to whether or not that particular exhibit was  
2 played.

3 But I do think it's important to put it  
4 in the context of the fact that we have had errors  
5 in the -- in what has been admitted that were  
6 caught by the defense in good faith and -- you  
7 know -- in which we notified the Court and the  
8 state. And I think that's one important point.

9 I think the other important point is to  
10 put this into context that this is the time, the  
11 time period, and the Court can look at the record,  
12 in which the state had this compilation of  
13 hundreds -- I should say 109. But I believe it was  
14 actually more than 109 in the beginning of just  
15 random clips that they just offered en masse.

16 And we had to slow this whole process  
17 down to figure out what it was that they were  
18 actually trying to do. And the ultimate number of  
19 clips that were admitted was significantly less.

20 So, again, I defer to the Court's memory  
21 as to whether that particular clip was played. I  
22 do not recall it being played. Mr. Kelly does not  
23 recall it being played. Ms. Seifter does not  
24 recall it being played.

25 But, again, we defer to the Court on

1 that.

2 MR. KELLY: Judge, I'm going to state the  
3 obvious. It begs the question as to what's left in  
4 this closing argument. I can see the computer  
5 screen, and I see some other audio clips. And I'm  
6 going to state for the record now, I also see the  
7 photographs of the three victims.

8 And I'd object to the photographs of the  
9 victims being shown yet again to this jury during  
10 Ms. Polk's closing. If I recall, there was an  
11 admonishment from the Court during the opening  
12 statement when they remained on the monitor for  
13 about 34 or 35 minutes. There was an objection  
14 during her first closing argument when they  
15 remained on the monitor for about 11 or 12 minutes.  
16 And then, finally, in the surrebuttal closing, I  
17 believe they were up there for 4 or 5 minutes.

18 And, again, appealing to the passion and  
19 prejudice of the jury, it's grounds for a mistrial.  
20 I can see and you can see now on the exhibit, the  
21 PowerPoint by the State of Arizona, that somewhere  
22 in the sequence of this closing, yet again Ms. Polk  
23 intends to show the victims' photographs. That's  
24 highly improper.

25 MR. LI: Your Honor, I just want to note

1 something for the record too. I see that this  
2 is -- and I don't know what the whole -- their list  
3 of things. But Exhibit 34 dash, underscore 31,  
4 that means there were at least, I think, 31 clips  
5 on -- if the numeric makes sense. It would be  
6 Exhibit 734\_1. I am positive Ms. Polk did not play  
7 34. And I don't know if this is the highest number  
8 on Exhibit 734. This would imply that at least 31  
9 clips were played during opening statements, which  
10 I simply do not think is the case.

11 MS. POLK: Your Honor, first of all, those are  
12 references for my use only. They don't suggest  
13 what Mr. Li has just suggested. And I would just  
14 urge to the Court these are admitted exhibits.  
15 They were played during the opening or sometime  
16 during the trial. And the Court has the exhibit  
17 list and the minute entries.

18 And these late-stage objections based on  
19 memory are simply -- should not stop this process  
20 from going ahead. I'm relying on admitted  
21 exhibits, and we should proceed with the process.

22 MR. KELLY: Judge, could I ask a brief  
23 question? Is this the actual exhibit that's being  
24 played?

25 THE COURT: Is it the actual exhibit?

1 MS. POLK: No, Your Honor. These are  
2 excerpts. But the exhibit is in, and these are  
3 excerpts. And I'm running them off my laptop just  
4 as defense has run things off their laptop  
5 throughout the trial.

6 THE COURT: In this trial, given the large  
7 number of exhibits, using the actual exhibit  
8 certainly would probably just obviate this whole  
9 issue right now. As a matter of record, this has  
10 been admitted, and yet you're playing something  
11 that you're making an avowal that it has been, but  
12 you're not actually displaying the exhibit. And  
13 what needs to be used is the exhibit.

14 MS. POLK: Your Honor, the exhibit itself is  
15 much longer. I don't want to sit here and play a  
16 much longer exhibit. It's entirely appropriate to  
17 play excerpts from exhibits.

18 I will submit this on a CD. For the  
19 record, this is an issue that the defense can  
20 preserve. They've certainly thoroughly argued it.  
21 But I'll make an avowal to the Court that these are  
22 excerpts from the exhibits. And I would just ask  
23 that I be allowed to continue.

24 MR. KELLY: Judge, again, speaking of  
25 recollection, I don't understand this. I recall

1 Ms. Polk's opening statement, which had a few  
2 excerpts, and took place on March 1. On March 2  
3 you had ordered that a CD of those excerpts be  
4 marked as an exhibit, which should be Exhibit 734.  
5 That's all that was agreed upon, not some lengthy  
6 audiotape from my client's statements.

7 MR. LI: We have, Your Honor -- we're looking  
8 at Exhibit 734, which is thumb drive on the  
9 computer. And there appear to be 20 some-odd clips  
10 on this thumb drive, including this one. And I  
11 would have to look at Ms. Polk's opening statement  
12 to see if she paused for 20 different clips being  
13 played. I do not recall being that being the case.

14 THE COURT: The exhibit is what is admitted.  
15 That's been admitted. Now -- and I have an avowal  
16 from Ms. Polk that -- I have no reason to question  
17 really except I don't know. I don't know.

18 Here's the actual exhibit admitted. That  
19 can be used. And then there is something that is  
20 there is an avowal to me that it's just a  
21 duplication but no way for the defense really to  
22 verify that.

23 MS. POLK: Your Honor, again, I'll provide to  
24 the defense a copy of what I'm playing now for the  
25 jury. But to suggest somehow that the state cannot

1 play excerpts of an exhibit and put it into  
2 PowerPoint would be unworkable for me.

3 THE COURT: I think if there is notice to the  
4 other side and the other side has a chance to look  
5 at it. Otherwise it's just somewhere down the line  
6 there is this problem. And, of course, what about  
7 the actual fairness of the trial right now? What  
8 about that?

9 MS. POLK: Your Honor, I'll provide a copy to  
10 the defense right now. But --

11 THE COURT: Why not?

12 MS. POLK: I will --

13 THE COURT: Why not provide it to the defense?  
14 Why not have the evidence out where people can look  
15 at it, what's being played, given the number of  
16 exhibits, as I've indicated? Why not, Ms. Polk?

17 MS. POLK: Your Honor, I'm willing to do that  
18 right now. I will provide it to them right now.  
19 But this interruption and this challenging of  
20 evidence during the closing arguments is just  
21 highly improper.

22 MR. KELLY: I object to that term. Judge,  
23 this is a public proceeding. I have not done  
24 anything improper except to represent my client.  
25 And I hear this repeatedly. You admonished Mr. Li

1 and I not to do that to opposing counsel some three  
2 and a half months ago when he used the word  
3 "unfettered recklessness." And we have not made  
4 any --

5 THE COURT: Mr. Kelly, I said to both sides I  
6 don't like gratuitous -- the phrase I used -- you  
7 know -- remarks or disparaging remarks. I don't  
8 appreciate that. And that was addressed to both  
9 sides. And it's going to -- we're not going to  
10 interrupt each other. That's not going to happen.  
11 It's just not.

12 What's going to happen now is we're going  
13 to get the exhibit out.

14 And, Ms. Polk, I'm going to say this:  
15 Yes. Normally in a closing argument, many of them,  
16 you don't see any objections whatsoever. You  
17 don't. Sometimes very few. Sometimes given the  
18 complexity of an issue, the complexity of this  
19 case -- this isn't the typical case.

20 And there are legitimate evidentiary  
21 concerns, and there have been from the beginning in  
22 this case. So at this point I want to verify that  
23 what's being played has, in fact, been admitted.

24 Thank you. We're in recess.

25 (Recess.)

1 (Proceedings continued in the presence of  
2 jury.)

3 THE COURT: The record will show the presence  
4 of Mr. Ray, the attorneys, the jury.

5 Ms. Polk, please continue.

6 MS. POLK: I apologize. I had started to play  
7 an audio. And I'm going to go back and play that  
8 particular audio again. Just to give you the  
9 context, this is where Mr. Ray urged participants  
10 to play full on; get their money's worth; promised  
11 them if they played full on, they would have a  
12 breakthrough. And this is his words from Sunday.

13 (Audio played.)

14 MS. POLK: Mr. Ray also told his participants  
15 that he would facilitate and accelerate their  
16 expansion and enlightenment during the five days of  
17 the Spiritual Warrior event. He told them that it  
18 would help them realize the results they wanted  
19 financially, spiritually, physically, emotionally  
20 and in relationships.

21 And, again, his words from Sunday.

22 (Audio played.)

23 MS. POLK: Mr. Ray also reminded the  
24 participants that they had invested a lot of money  
25 and that they should play full on and, in his

1 words, be impeccable.

2 (Audio played.)

3 MS. POLK: Mr. Ray told his participants that  
4 his event was an accelerated learning program, that  
5 everything they were doing was for a reason and  
6 that they were there to push their thresholds.

7 (Audio played.)

8 MS. POLK: The events of the week were like a  
9 pyramid with the sweat lodge at the top. That was  
10 the pinnacle event intended to make participants  
11 believe they got something for their money -- this  
12 ultimate experience, the altered mental state.

13 (Audio played.)

14 MS. POLK: That, of course, was Mr. Ray's  
15 introduction to the sweat lodge. That heat event  
16 is how the defendant delivered on that promise of  
17 giving them breakthroughs and altered mental  
18 states. The defendant created for the participants  
19 the most intense experience he could using heat to  
20 push them far beyond anything that was safe.

21 The evidence in this case has shown that  
22 the expectation of pecuniary gain was both the  
23 motive and the impetus for Mr. Ray to create that  
24 intensely hot sweat lodge.

25 You are not required to find that the

1 money, the pecuniary gain, came directly from a  
2 victim, just that the defendant committed the  
3 offenses in receipt or in anticipation of receipt  
4 of pecuniary gain.

5 For example, you know that Liz Neuman was  
6 a volunteer and did not pay the \$10,000. That does  
7 not matter. To find the pecuniary gain as an  
8 aggravating circumstance for Count II, which is the  
9 count in which Liz Neuman is the victim, as well as  
10 the other two counts, what you must find is that  
11 the defendant's receipt or his expectation of  
12 receipt of pecuniary gain or money was his impetus  
13 for his motive in creating the intense experience,  
14 his version of a sweat lodge.

15 And in that regard, I urge you to do the  
16 math. And I will point you to the 50 waivers from  
17 the paying participants.

18 50 times \$10,000, a little less than  
19 \$10,000 each, is close to half a million dollars.  
20 Both the direct and the circumstantial evidence in  
21 this case has shown you that Mr. Ray is JRI, that  
22 he holds all the corporate officer positions, that  
23 he called all the shots, that it was his conduct  
24 and his expectation of pecuniary gain that led to  
25 these deaths.

1 The defendant's grand-slam event, his  
2 heat-endurance challenge, his need to deliver this  
3 extreme event to make participants believe they  
4 were getting something for their money, was  
5 beyond -- is beyond any reasonable doubt the  
6 aggravating circumstance of pecuniary gain.

7 The state has also alleged as an  
8 aggravating circumstance that the defendant was in  
9 a unique position of trust with respect to the  
10 victims. And you heard testimony yesterday about  
11 the strong personalities of Liz, of Kirby, and of  
12 James. That testimony is compelling evidence of  
13 the unique position of trust that Mr. Ray held with  
14 the three victims, that these independent,  
15 strong-willed, safety-conscious individuals would  
16 set aside their own strong self-preservation  
17 instincts and remain inside Mr. Ray's  
18 heat-endurance challenge.

19 To find this aggravating circumstance, I  
20 also urge you to consider the long relationship  
21 that Liz Neuman had with Mr. Ray and how she  
22 actually sponsored an event in Minnesota for  
23 commission for him and the number of events that  
24 she personally attended as a Dream Team member.

25 I urge you to consider all the testimony

1 you heard at this trial, the audio clips of Kirby  
2 Brown and James Shore -- those were exhibits 743  
3 and 754 -- for the limited purpose that they were  
4 admitted, for the effect on the listener, on  
5 Mr. Ray, and then this audio clip from Sunday.

6 (Audio played.)

7 MS. POLK: In determining whether the  
8 defendant had a unique position of trust with each  
9 victim, you may also consider as circumstantial  
10 evidence the testimony of the witnesses throughout  
11 this trial as they describe for you the trust that  
12 they each placed in the defendant and the unique  
13 reluctance and refusal of participants to interrupt  
14 Mr. Ray inside that tent.

15 You will recall the testimony of Mike  
16 Olesen, the businessman from Canada, who told you,  
17 I don't think it would have been a good idea to  
18 interrupt the ceremony. He doesn't like it when  
19 people interrupt the process.

20 And you will recall the testimony of  
21 Dennis Mehravar, who testified that even if he knew  
22 that someone next to him was dying, he did not feel  
23 he could interrupt Mr. Ray inside that tent.

24 Many witness's testified they trusted the  
25 defendant to help them with their personal

1 development and their spiritual growth. You heard,  
2 again, in Mr. Ray's own words, how he promised them  
3 the threshold experiences would make them stronger.  
4 And you know for a fact that Liz, Kirby and James  
5 all followed Mr. Ray's urging to stay inside that  
6 tent.

7 (Audio played.)

8 MS. POLK: Many witnesses at this trial  
9 testified that because of Mr. Ray they were  
10 willing, determined and ready to make whatever  
11 changes they needed to in order to reach their  
12 goals and improve their lives.

13 You will recall Scott Barratt, the  
14 contractor from Spokane, who told you that he  
15 believed that Mr. Ray would keep him safe; the  
16 testimony of Kim Brinkley, who told you how nervous  
17 she was about the heat but that she trusted Mr. Ray  
18 and that he would keep her safe.

19 You will recall Lou Caci, also from  
20 Canada, describing Mr. Ray as his guru. And he  
21 told you how he trusted that Mr. Ray knew what he  
22 was doing and that he never even thought of leaving  
23 the sweat lodge because he wanted to finish it to  
24 realize his intentions that were in his pouches,  
25 and he wanted to play full on.

1 Laurie Gennari, you will recall,  
2 testified that playing full on means mostly doing  
3 things Mr. Ray's way. And she told you that she  
4 had paid huge piles of money to be there and that  
5 she was there to follow Mr. Ray's program.

6 Ms. Gennari also testified that it never  
7 crossed her mind not to participate in the sweat  
8 lodge because she had paid money, that she expected  
9 the week to be different and that she was  
10 determined to get the most out of it. Finally, she  
11 told you that she trusted Mr. Ray and that he told  
12 her he had done this before.

13 Dennis Mehravar, also from Canada. You  
14 will recall he described Mr. Ray as his mentor.  
15 And he said that he wanted to complete that sweat  
16 lodge to become a new person. He testified that he  
17 trusted Mr. Ray more than he believed in himself.  
18 And, in his words, he said, with all my experiences  
19 before with Mr. Ray, I believed he knew how far I  
20 could go better than myself.

21 Stephen Ray, from California, told you he  
22 trusted Mr. Ray. And he told you that his trust in  
23 Mr. Ray was the only thing that allowed him to  
24 believe he could survive the rigors of that sweat  
25 lodge. In his words, he said, part of the reason I

1 went in there knowing how uncomfortable I was was  
2 that I truly trusted my knowledge of how much  
3 control he had over everything and that he wouldn't  
4 let anyone get hurt.

5 You will recall that Stephen Ray, when he  
6 decided to leave, he passed out. He woke up in ICU  
7 in Flagstaff sometime later. His testimony to you  
8 was, the last thing I remember was feeling my way  
9 out. I don't know how long I was in there roasting  
10 after that.

11 Melissa Phillips, also from Canada,  
12 testified that Mr. Ray intentionally did not let  
13 them know what events were coming up. In her  
14 words, she said, you're supposed to show up not as  
15 prepared in order to have your breakthrough. And  
16 she told you she understood the sweat lodge was a  
17 rebirthing and she understood it was a spiritual  
18 journey.

19 Linda Andresano, from Tucson testified  
20 that at the beginning of that sweat lodge, Mr. Ray  
21 had said, play full on, so she played full on by  
22 not leaving. In her words, she said, I was trying  
23 to be honorable by staying. I felt this was an  
24 honorable way to die. Last thing she thought about  
25 before passing out was, as you will recall, it's a

1 good day to die.

2 And then she told you, if I had been in  
3 my right mind, I would have gotten out of there.  
4 She said she didn't know why she didn't leave, that  
5 if she had been thinking professionally, she never  
6 would have allowed herself to do what she did.

7 You will recall Dr. Beverly Bunn, the  
8 dentist from Texas, who ended up working directly  
9 with Mr. Ray, and her testimony to you that she  
10 believed that Mr. Ray knew better than she did what  
11 she needed to do to address her issues.

12 And then you learned in this trial that  
13 Kirby Brown also had some one-on-one work with  
14 Mr. Ray.

15 And then, finally, Jennifer Haley, the  
16 Dream Team member hair dresser from California,  
17 testified that her opinion was that Mr. Ray had too  
18 much power and he was too strong, and that while  
19 she thought the event was dangerous, she also  
20 believed that Mr. Ray would keep them safe.

21 That, ladies and gentlemen, is evidence  
22 beyond any reasonable doubt as to that aggravating  
23 circumstance that Mr. Ray was in a unique position  
24 of trust with respect to the three victims.

25 I want to review some medical records

1 with you for the three victims. As you know, James  
2 Shore and Kirby Brown both died as unidentified  
3 patients, a fact that will always haunt their  
4 families. And Liz was lying in a coma in the  
5 Flagstaff hospital for a full day before her family  
6 even learned she was there.

7 I'm going to put up on the overhead  
8 Exhibit 378. These are the medical records for  
9 James Shore. You can see how James Shore was  
10 identified as VVMC, Verde Valley Medical Center,  
11 Doe 52.

12 And I'm going to flip to Bates 02051 to  
13 show you that James Shore was pronounced dead on  
14 arrival on October 8, 2009 at 1828, which is  
15 6:28 p.m.

16 Then at Bates 02045, which is the human  
17 remains release form, that James Shore at the time  
18 of his release is still Doe 52.

19 What you know, ladies and gentlemen, is  
20 that James Shore was pronounced dead on Thursday,  
21 October 8, at 6:30 p.m. And he had -- Alyssa  
22 Gillespie, his wife, does not learn until the next  
23 day, Friday night, at 10:00 p.m., after becoming  
24 frantic that James has not called her to pick him  
25 up at the airport. That's almost 30 hours after

1 her husband was pulled out of that sweat lodge.

2 And the same thing for Kirby Brown. I'm  
3 going to show you Exhibit 373, which are the  
4 medical records for Kirby. You can see from this  
5 exhibit that Kirby is Doe 51 at the same hospital,  
6 the Verde Valley Medical Center. And I'll refer  
7 you to Bates 01652, which shows you Kirby's time of  
8 death, October 8, 2009 at 1821, which is 6:21 p.m.,  
9 the patient identification unknown.

10 On October 8, Thursday, at 5:00 -- at  
11 6:21 p.m., Kirby was pronounced dead, yet her  
12 parents, Ginnie and George, don't learn of their  
13 daughter's death until the next morning when a  
14 state trooper comes to their door.

15 And Liz Neuman's medical records,  
16 Exhibit 365 -- this is Bates 2596 -- shows you that  
17 Liz was identified by the Flagstaff Medical Center  
18 as Quebec Quebec, F134; and later her name was  
19 caught up. Liz remains Quebec Quebec all day  
20 Friday, October 9.

21 This is a record from -- you can see  
22 along here these are entries the next day on  
23 Friday, October 9. Liz is still being identified  
24 as Quebec Quebec, F134. It's not until late that  
25 day -- you can see here as the 9th and then the

1 10th. But we know sometime on the 9th, then, the  
2 family catches up with -- their parent or mother.

3 On Thursday evening after being pulled  
4 out of that sweat lodge, Liz was flown to  
5 Flagstaff, and then Quebec Quebec all that night  
6 and all that next day until Friday after work when  
7 Liz's daughter Andrea receives that call from her  
8 cousin and gets on the internet and has to figure  
9 out for herself that her mother is one of the  
10 casualties and has to call the hospital asking for  
11 Liz Neuman.

12 They don't have a Liz Neuman there. And  
13 then before she hangs up thinks to ask do you have  
14 any Jane Does. And as Andrea testified from the  
15 stand, she had to give a description of her mother  
16 that Friday night and learn from the nurse that  
17 that was her mother lying there in a coma in that  
18 bed at the Flagstaff hospital.

19 These are the verdict forms, ladies and  
20 gentlemen, that I want to show you. This is  
21 aggravating circumstance verdict for victim Kirby  
22 Brown, verdict form for Count I. And with respect  
23 to each of the counts the state has alleged the  
24 three aggravating circumstances.

25 The first is that the defendant committed

1 the offense as consideration for the receipt or in  
2 the expectation of the receipt of anything of  
3 pecuniary value.

4 The second is that the victim -- or if  
5 the victim has died as a result of the conduct of  
6 the defendant, the victim's immediate family  
7 suffered emotional harm.

8 And the third is that the defendant was  
9 in a unique position of trust with the victim.

10 And with respect to each one, you need to  
11 determine whether the state has proven beyond a  
12 reasonable doubt that the aggravating circumstance  
13 exists or if the state has not proven it. With  
14 respect to each one of the counts, the state has  
15 alleged the existence of these three aggravating  
16 circumstances.

17 That's the first verdict form, for Kirby.  
18 The second, as you can see, is for Liz Neuman.  
19 Again, the same three aggravating circumstances.  
20 And the last form is for James Shore. And, again,  
21 the same three aggravating circumstances.

22 The unexpected deaths of Kirby Brown,  
23 James Shore and Liz Neuman, who said goodbyes to  
24 their families expecting to be back in five days,  
25 are senseless deaths that the families still

1 struggle with today.

2 You heard from just a few family  
3 members -- a mother, a daughter, and a wife. And  
4 there is nothing I can say to add to that  
5 heart-wrenching testimony. But you have clearly  
6 heard, ladies and gentlemen, evidence beyond any  
7 reasonable doubt that the families have suffered  
8 emotional harm.

9 With respect to the allegation of  
10 pecuniary gain, the state has proven beyond a  
11 reasonable doubt that Mr. Ray committed the  
12 offenses as consideration for the receipt or in the  
13 expectation of the receipt of pecuniary gain.

14 Mr. Ray and his company, JRI, receive --

15 MR. KELLY: Excuse me, Ms. Polk.

16 I object. Based on the previous  
17 discussions, we would like to have an opportunity  
18 at sidebar to make a record.

19 THE COURT: Ms. Polk, Mr. Kelly, approach.

20 (Sidebar conference.)

21 THE COURT: Because of what the --

22 Ms. Polk, first of all, I'm asking you  
23 right now to remove the photos. Right now.

24 Thank you.

25 Because we got wrapped up in this exhibit

1 issue, I meant to address this also. I was going  
2 to tell you, Ms. Polk, a brief display of the  
3 photos I was going to permit. At this point it  
4 gets to -- it's getting to the point where it's an  
5 appeal to passion. Photos have been shown  
6 repeatedly throughout the trial and just leave them  
7 there. It's beyond relevance that I can see.

8 Mr. Kelly, that's my thought. And your  
9 objection?

10 MR. KELLY: Judge, I just want the record to  
11 reflect that the photos of the three decedents were  
12 again displayed to the jury for an proximate one-  
13 to two-minute time period.

14 MS. POLK: Your Honor, this entire -- this is  
15 my ending. I'm going to talk for one to two  
16 minutes, and I'm going to sit down. I am summing  
17 up the three aggravating circumstances, one of  
18 which is this issue of trust by the victims. And  
19 the second is the emotional harm. I have a total  
20 of two minutes that I intended to display these,  
21 and then Mr. Kelly interrupted me. But I am  
22 finished. And I'm entitled to show the pictures of  
23 these three victims for a couple minutes as I  
24 finish. I would be done right now if I had not  
25 been interrupted.

1 THE COURT: I my think Mr. Kelly's estimate  
2 was right. A minute to two minutes has been  
3 displayed. At this time it's a 403 if it goes any  
4 further. So they're not to be displayed any  
5 further.

6 (End of sidebar conference.)

7 THE COURT: Ms. Polk.

8 MS. POLK: Thank you.

9 The state has also proven beyond any  
10 reasonable doubt the aggravating circumstance of  
11 pecuniary gain, that Mr. Ray is JRI and that the  
12 offenses were committed as consideration or in  
13 anticipation of receipt of pecuniary gain.

14 Mr. Ray -- the participants paid close to  
15 \$10,000 each, in exchange for which Mr. Ray  
16 delivered, delivered, this ultimate grand-slam  
17 event, this heat-endurance challenge, to make  
18 participants believe they had gotten something for  
19 their money.

20 And then, finally, the state has also  
21 proven beyond a reasonable doubt that Mr. Ray was  
22 in a unique position of trust with the three  
23 victims. Through both direct and some  
24 circumstantial evidence we have proven that the  
25 victims trusted Mr. Ray; that they trusted he knew

1 what he was doing; they trusted he knew something  
2 they did not know; they trusted that if they did  
3 what he said, they would realize their own goals  
4 and dreams. Most of all, when the victims embarked  
5 on the events that Mr. Ray had in store for them,  
6 they trusted that he would keep them safe.

7 Mr. Ray's conduct in creating this  
8 extreme event to make participants think they got  
9 something of value for their money took precedence  
10 over the sanctity of human life. Mr. Ray took  
11 their money, their trust, their dreams, and the  
12 lives of Liz Neuman, Kirby Brown and James Shore.

13 And I ask that you find the defendant --  
14 you find that the state has proven beyond a  
15 reasonable doubt with respect to each of the three  
16 counts all three of the aggravating circumstances.

17 Thank you.

18 THE COURT: Thank you, Ms. Polk.

19 Mr. Kelly.

20 MR. KELLY: Thank you.

21 I probably need to get that microphone  
22 from Ms. Polk.

23 Again, please understand that, as I said  
24 yesterday, I have difficulty finding that there was  
25 any criminal act. So, of course, that increases

1 the difficulty to speak to you about aggravating  
2 circumstances. You folks last week convicted my  
3 client of murder.

4 MS. POLK: Objection, Your Honor.

5 THE COURT: Sustained.

6 MR. KELLY: You found a judgement of guilt as  
7 to negligent homicide, which is murder.

8 MS. POLK: Objection, Your Honor.

9 THE COURT: Sustained.

10 MR. KELLY: If you didn't do that, then I  
11 guess I'd be punching cows today. But as a result  
12 of your verdict, I find it difficult to stand up  
13 here and talk about aggravating circumstances. And  
14 the best way that, based on my experience, which is  
15 extensive with homicide cases, to explain  
16 aggravating circumstances is that there is special  
17 circumstances associated with criminal conduct.

18 What I mean by that is that they're above  
19 and beyond what is normally displayed for a  
20 particular crime. There is something that  
21 aggravates the circumstance underlying the  
22 negligent homicide, something that makes it worse  
23 than a regular negligent homicide.

24 Has there ever, ever been the death of a  
25 human being in the United States of America that

1 did not carry with it extreme emotional distress  
2 for the family members? Think of your own lives,  
3 your family members, your friends that have died.  
4 Is anyone going to say that was not an extremely  
5 emotional, traumatic experience, regardless of the  
6 circumstance?

7 So when I look at these victims,  
8 undoubtedly, undoubtedly, when these three good  
9 people died, as Mr. Li told you at the opening  
10 statement, it was never the position of the defense  
11 or Mr. Ray that somehow that those three very, very  
12 good, accomplished human beings did not cause  
13 emotional harm -- the death did not cause emotional  
14 harm to their families, that that cannot be  
15 considered a loss to our community or society.  
16 Because it is.

17 But if you recall going back some four  
18 and a half to five months, in February, I asked a  
19 question during the jury selection process. We  
20 literally started with hundreds of people to narrow  
21 it down to the 12 that Judge Darrow believed were  
22 qualified.

23 I asked you whether or not you could  
24 follow the law. If you can't follow the law for  
25 whatever reason, then you have no business being on

1 the jury. The law as the blue book, which is the  
2 Constitution and the laws of the United States and  
3 Arizona, has been synthesized to these further  
4 instructions provided to you by Judge Darrow. And  
5 you note that they include on the face page the  
6 third paragraph. You may also rely on the jury  
7 instructions that were read and given to you  
8 earlier, which were entitled last week the "Final  
9 Instructions to The Jury."

10 As Ms. Polk has argued now in her closing  
11 that in order to make the determination today, you  
12 are to consider this law, this law, the facts from  
13 the original portion of this trial and then, of  
14 course, facts presented yesterday during the victim  
15 testimony. That's what you have to consider.

16 I've highlighted a portion of my  
17 instructions, further instructions, to the jury.  
18 And the first one is the law is consistent. Every,  
19 every, criminal offense in the United States of  
20 America that you have to find each and every  
21 element of each and every aggravating circumstance  
22 beyond a reasonable doubt.

23 Mr. Li in his closing attempted to  
24 exemplify the blue book placed on the bar, how high  
25 of a burden that is. The definition is provided, I

1 believe, in the further instructions on page 3. It  
 2 hasn't changed. Proof beyond a reasonable doubt is  
 3 proof that leaves you firmly convinced the alleged  
 4 aggravating circumstance is proven. There are very  
 5 few thing in the world we know with absolute  
 6 certainty. And in criminal cases the law does not  
 7 require proof that overcomes every doubt. If,  
 8 based on your consideration of the evidence, you  
 9 are firmly convinced that the alleged aggravating  
 10 circumstance is proven, then you must find Mr. Ray  
 11 guilty. Or, excuse me. You must find that the  
 12 alleged circumstance exists.

13 If, on the other hand, you think there is  
 14 a real possibility that it's not proven, you must  
 15 give Mr. Ray the benefit of the doubt.

16 Now, Mr. Li emphasized that repeatedly  
 17 during his closing arguments, that if you were  
 18 going to adhere to your oath and do your job as a  
 19 jury, you have to begin, first of all, with giving  
 20 us your word that you're going to follow the law,  
 21 that you're going to read and understand and  
 22 discuss as a jury what the law means.

23 And as Judge Darrow has instructed you in  
 24 the third paragraph, you must -- you don't have an  
 25 option. You must follow these instructions.

1 So let's look at a second at some of the  
 2 evidence. An aggravating factor, a special  
 3 circumstance, in the crime of murder is pecuniary  
 4 gain. A classic example is a murder for hire. I  
 5 pay someone to kill someone else, I have  
 6 participated in that murder for the pecuniary gain.  
 7 Or, excuse me. If I have been paid to shoot  
 8 someone else, I participated in that murder for  
 9 pecuniary gain.

10 Another example is taking out a life  
 11 insurance policy on your spouse and then killing  
 12 your spouse. Why did you kill them? For the  
 13 money.

14 This is a stretch beyond comprehension  
 15 that if \$10,000 was paid for a five-day seminar for  
 16 people who were repeatedly, as Exhibit 734,  
 17 encouraged to choose, to choose, which activities  
 18 they wanted to participate in, were encouraged to  
 19 give the full dollar amount of their investment,  
 20 and encouraged and repeatedly emphasized by  
 21 Mr. Ray -- and I tried to write this down  
 22 correctly -- it's not how you die. The question is  
 23 not how you die. The question is always how you  
 24 live.

25 That's what they were paying the \$10,000

1 for is to improve their life, period. I could not  
 2 imagine -- if you take a look at Judge Darrow's  
 3 jury instructions where the aggravating  
 4 circumstance of pecuniary gain is defined by the  
 5 Court, and I've highlighted a portion, there must  
 6 be a connection between the motive and the kill.  
 7 It's like taking a life insurance policy out on  
 8 someone and killing them. There is a connection.

9 The connection here is people were coming  
 10 to better their lives. They were learning how to  
 11 improve their station in life. They were not  
 12 cheap. How many times on cross-examination did  
 13 Mr. Li, Ms. Do, and I ask the witnesses, do you  
 14 think Mr. Ray is a guru? Would you do anything and  
 15 everything he says? Do you realize that the media  
 16 has described each of you as followers as a cult?

17 And they adamantly disagreed with that.  
 18 The purpose, as indicated by Mr. Ray, was the  
 19 question is always how did you live. Live  
 20 impeccably. Adhere to your oath.

21 I wrote some notes during Ms. Polk's  
 22 closing argument that all you have to do is follow  
 23 the money. The defendant was paid \$10,000. Exact  
 24 words from Ms. Polk. The defendant was paid  
 25 \$10,000. And if you see my passion and anger, it's

1 because I've taken an oath. I took an oath in  
 2 front of the Arizona Supreme Court to represent my  
 3 client to the best of my ability, be a complete  
 4 advocate for Mr. Ray and to adhere and protect the  
 5 Constitution and the laws of the State of Arizona.  
 6 I'm an officer of the Court. It's what I do.

7 It doesn't come without expense. You may  
 8 not like me. And the only thing I can say to that  
 9 is I wish we would have met under different  
 10 circumstances. But if you were to say I did not  
 11 respect Tom Kelly because he did not represent  
 12 Mr. Ray, that would bother me.

13 So when Ms. Polk said defendant was paid  
 14 \$10,000 and his motive was profit, I jumped up and  
 15 I interrupted her, and we approached the bench.  
 16 And the reason is because Judge Darrow tells us you  
 17 should not guess about any fact.

18 There has been no evidence in this case  
 19 that James Ray received one thin dime. There was  
 20 evidence, 50 some waivers, that JRI received money.  
 21 There was evidence that Angel Valley received  
 22 money. There was evidence, as Ms. Polk indicated,  
 23 that my client is an officer of JRI. Isn't that  
 24 the end of the evidence? At that point in time, as  
 25 a jury, don't you have to guess? If you're going

1 to guess that defendant was paid \$10,000, don't you  
 2 have to guess as to the financial structure of JRI?  
 3 Don't you have to guess as to whether or not JRI  
 4 was financially stable back in October of 2009?  
 5 Don't you have to guess whether or not Mr. Ray was  
 6 volunteering his time to his corporate entity or  
 7 whether he was paid a salary?

8 And yet Judge Darrow says you cannot  
 9 guess about any fact. And the government wants you  
 10 to believe that my client somehow financially  
 11 profited from this event.

12 I do get passionate. And I'd ask that  
 13 you not hold that against Mr. Ray because this is  
 14 his trial and your trial. It's not about the  
 15 attorneys. What it is about is whether or not  
 16 Mr. Ray receives a fair trial, that you apply the  
 17 law as instructed by the Judge, and you base the  
 18 facts on what you remember.

19 Now, I don't remember any evidence that  
 20 my client was paid any money. I heard a story  
 21 about -- description, Ms. Polk, as to what  
 22 circumstantial evidence is. And that's a classic  
 23 law school example. The guy with the raincoat  
 24 coming in. It's cloudy outside and he's wet. So  
 25 circumstantially you can assume that it's raining

1 outside. That's a good example of circumstantial  
 2 evidence.

3 But a leap in faith of logic to go  
 4 between a corporate entity which received \$10,000,  
 5 perhaps somewhere close to half a million dollars,  
 6 into the pockets of Mr. Ray, requires you to guess  
 7 and violate your oath as a juror.

8 On that aggravating circumstance I would  
 9 submit to you, first of all, that it simply does  
 10 not apply as defined. This is not a case of  
 11 homicide or where there was a killing in order to  
 12 make money. Secondly, the factual basis is  
 13 woefully inadequate.

14 The third aggravator is on the next page,  
 15 that the defendant was in a unique position of  
 16 trust. A unique position of trust is the  
 17 relationship between a foster parent and a foster  
 18 child. And if there is a sexual abuse crime  
 19 committed against that child, that is a special  
 20 aggravating circumstance. Because, unlike the  
 21 stranger, that individual violated that special  
 22 position of trust, that unique position of trust,  
 23 in order to facilitate access to his or her victim.  
 24 That's what this aggravating circumstance is.

25 It doesn't say any position of trust.

1 It's not an aggravator if people trusted Mr. Ray.  
 2 It's not an aggravator if they -- somehow they're  
 3 in a five-day event or for others a much longer  
 4 relationship with Mr. Ray and trusted him. That's  
 5 not an aggravating circumstance in a homicide case  
 6 that causes it to rise above and beyond the level  
 7 of a regular negligent homicide.

8 That sounds so harsh, so unreasonable,  
 9 that we're going to talk about homicide cases in  
 10 that language. But that's what the law does. It's  
 11 harsh, as indicated by the victims yesterday.  
 12 Imagine you lose your loved one and then you have  
 13 to come into a court and deal with attorneys and  
 14 judges and talk about it. That's harsh. I can't  
 15 think of anything more harsh.

16 But the law is the law that protects us  
 17 as individuals in society. And the law says that  
 18 we cannot be swayed by sympathy or prejudice.  
 19 First page, last line. You must not be influenced  
 20 by sympathy or prejudice.

21 Probably noticed throughout the course of  
 22 four and a half months that I have no problem  
 23 objecting when I believe that my client's rights  
 24 are being violated in some circumstance. And that  
 25 includes time periods in which these three poor

1 individuals suffered as a result -- death as a  
 2 result of this tragedy are continually displayed.

3 It's not because I do not have sympathy  
 4 towards the victims. I do. It's because I know  
 5 that your job is difficult and if you are going to  
 6 adhere to that oath, you have to do that job  
 7 without being influenced by sympathy and prejudice.

8 So when we look at a unique, a unique,  
 9 position of trust, that's the qualifier. That's  
 10 the circumstance. The foster child with a foster  
 11 parent. Some position of trust that allows the  
 12 defendant to gain access to his victim. And during  
 13 that time period in which he or she gains access  
 14 negligently causes their death. Then that's an  
 15 aggravating circumstance of that offense.

16 It's not giving speeches for money that  
 17 says it's not how you live -- excuse me. It's not  
 18 how you die. The question is always how you live.

19 You know, I wrote down a few phrases in  
 20 regards to pecuniary gain and unique position of  
 21 trust. You know, the investment described on that  
 22 audio clip was for a breakthrough, a breakthrough.  
 23 I didn't hear anybody say the investment is I'm  
 24 going to subject you to a heat-endurance challenge  
 25 that's going to cause your death. Trust me. I'm

1 in a unique position in which I'm going to subject  
2 you to a unique heat-endurance challenge that's  
3 going to cause your death. That's simply not this  
4 case.

5 The exhibit today you heard said, my  
6 intentions for you are such things as accelerating  
7 your enlightenment. You have to choose as to the  
8 intensity upon which you decide to play. You have  
9 to choose what level you decide to play. You've  
10 invested a lot of money.

11 If you were to come back finding the  
12 aggravating circumstance of pecuniary gain has been  
13 met beyond a reasonable doubt, then you would have  
14 to find that Mr. Ray killed these people for money.  
15 It's a very poor business model.

16 If you're going to find the aggravating  
17 circumstance that he was in some unique position of  
18 trust, then these types of statements where he's  
19 encouraging free will, you have to choose. And, of  
20 course, the actual facts. You recall the people  
21 who left, the doctor and the lady's name I can't  
22 pronounce, who left during the seminar; and the  
23 lady, Ms. Hefstad, who left right before the sweat  
24 lodge; and the testimony from witnesses, Dream Team  
25 members. I did it before. I'm not going to do it

1 again. That's indicators of free will.

2 So how did or why would a unique position  
3 of trust now suddenly aggravate the circumstance of  
4 your verdict of negligent homicide? Doesn't make  
5 any sense.

6 And, of course, finally the second  
7 circumstance is that the victim has died as a  
8 result of conduct of the defendant. And before I  
9 go there, that's my final portion of this, and I'll  
10 be finished.

11 Ms. Polk mentioned in regards to the  
12 position of trust that there was compelling  
13 evidence. Compelling evidence is not evidence  
14 beyond a reasonable doubt, by definition. If the  
15 state has compelling evidence of a position of  
16 trust, then you have to find that aggravating  
17 circumstance has not been proven. Because it's  
18 only when the state has proven it beyond a  
19 reasonable doubt. If you apply any other standard,  
20 you're violating your oath.

21 Now, the second aggravating circumstance  
22 is that the victim has died as a result of the  
23 conduct of defendant and has suffered emotional  
24 harm. And, of course, there is no doubt that the  
25 victims have suffered emotional harm. We heard

1 them yesterday. There is just absolutely no  
2 dispute about that. The real question for you to  
3 decide is -- when you go back is whether the  
4 conduct of the defendant caused that emotional  
5 harm.

6 These people who were in the sweat lodge,  
7 50 of them, were free to enter, free to leave.  
8 Yesterday Ms. Brown said in response to a question,  
9 what bothers you the most?

10 And she said, nobody helped my daughter.  
11 Dr. Wagoner didn't help her, Dr. Armstrong didn't  
12 help her. Dr. Bunn didn't help her. Mark Rock  
13 didn't help her. Megan Fredrickson didn't help  
14 her. James Ray didn't help her. And Mr. Li argued  
15 because no one knew that she was dying.

16 And you recall that example he had where  
17 if someone is dying in this courtroom -- looks like  
18 about 50 folks or so, maybe more -- which one of  
19 you is not going to get up and help?

20 You've come back with your verdict. Now  
21 you're coming into your second verdict. It has to  
22 do with aggravating circumstances. I'm asking you  
23 to reconsider that. It's undisputed in this case,  
24 undisputed the people had free will to leave the  
25 sweat lodge at any time. My aggravation is I

1 didn't get it yesterday. I disagree with your  
2 verdict. I have no problem telling you or anyone  
3 else that. Tragic, terrible accident. Tragic  
4 accident.

5 This is a nation of risk takers, all ages  
6 backgrounds, throughout its history of 250 years.  
7 It's what makes us great. And the implications are  
8 beyond comprehension when adults exercising free  
9 will in a lawful activity, 50 some of them, can be  
10 held responsible for a crime.

11 The further instructions indicate on the  
12 first page -- I'm not making any of this up. It  
13 says, you may also rely on the jury instructions  
14 that were read and given to you earlier. If you  
15 recall, earlier -- earlier there was an instruction  
16 about lost, destroyed evidence. Attorneys have a  
17 slang term for that. It's called the "Willits  
18 instruction" only because it comes from a case of  
19 that name. This is the law upon which you're  
20 entitled to rely on today.

21 You saw that connecting sentence from the  
22 further instructions, and this law was provided to  
23 you last week. And it says that if you find the  
24 state has lost, destroyed or failed to preserve  
25 evidence whose contents or quality are important to

1 the issues in this case, then you should weigh the  
2 explanation, if any, given for the loss or  
3 unavailability of the evidence. If you find that  
4 any such explanation is inadequate, then you may  
5 draw an inference unfavorable to the state, which,  
6 in and of itself, may create a reasonable doubt as  
7 to defendant's guilt. And, of course, in this  
8 case, in and of itself, may be a basis not to find  
9 the second aggravating factor. Actually, any three  
10 of them.

11 So you will soon be finished. And I  
12 cannot say without complete honesty that although I  
13 disagree with your verdict last week, I do  
14 appreciate your time. It's been a long four and a  
15 half months.

16 And after this proceeding today, when you  
17 come back with your verdict as to aggravating  
18 circumstances, you're going to be assaulted by the  
19 media. You're going to find safety in numbers.  
20 And you can choose whether to talk or not to  
21 anyone, including the victims, the attorneys.

22 But tomorrow you will have to ask the  
23 question or answer the question in your mind, that  
24 good man Dr. Ian Paul, who said he could not  
25 exclude organophosphates; the good man, Dr. Mosley,

1 who said he cannot exclude organophosphates; the  
2 good man, Dr. Lyon, who said you cannot exclude  
3 organophosphates. The reason this Willits  
4 instruction exists is so that you do not have to  
5 wonder the rest of your life as to whether that  
6 blood had organophosphates in it. You don't have  
7 to wonder the rest of your life whether you  
8 convicted an innocent man. Using this instruction,  
9 you can find today that none of these aggravating  
10 circumstances exist. Thank you.

11 THE COURT: Thank you, Mr. Kelly.

12 Ms. Polk.

13 MS. POLK: This, ladies and gentlemen, is why  
14 your jury instructions are so important. You've  
15 heard the defense suggest to you that you had to  
16 make some findings. But they're not in here. I  
17 just want to cover a few of them.

18 First of all, I'm going to put up on the  
19 overhead the jury instructions from page 2 that  
20 tells you you must consider all of these  
21 instructions. Do not pick out one instruction or  
22 part of one and ignore the others.

23 And as you determine the facts, however,  
24 you may find that some instructions no longer  
25 apply. You must then consider the instructions

1 that do apply together with the facts as you have  
2 determined them.

3 The defense just talked to you about  
4 pecuniary gain and told you that you had to find  
5 that Mr. Ray killed these people for money as in a  
6 murder-for-hire case. This is not a first degree  
7 murder case. This is not a murder-for-hire case.

8 And you do not need to find that the  
9 defendant killed these people for money. This is a  
10 negligent homicide case. What you do need to find  
11 is that Mr. Ray committed the offense, the conduct  
12 that constitutes the offense, in receipt for money  
13 or in anticipation of pecuniary gain.

14 It was suggested to you that the state is  
15 required to show that Mr. Ray financially profited  
16 or that he is solvent. That is not a requirement.  
17 We do not need to show that Mr. Ray even kept the  
18 money.

19 I would like to remind you to again use  
20 your common sense, knowing that Mr. Ray holds all  
21 the corporate positions in JRI, called all the  
22 shots, made all the decisions, and controlled every  
23 aspect of the conduct that resulted in the death of  
24 the three victims.

25 The state does have to show that Mr. Ray

1 committed the offenses in consideration of or in  
2 anticipation of receipt of pecuniary gain. And I'd  
3 like to read this instruction with you. In order  
4 to find this aggravating circumstance, you must  
5 find that the state has proven beyond a reasonable  
6 doubt that the defendant's motive, cause, or  
7 impetus for the commission of negligent homicide  
8 was consideration for the receipt of the  
9 expectation of pecuniary value. This may be based  
10 on tangible evidence and/or strong circumstantial  
11 evidence.

12 And yes. That example of the rain.  
13 Again, let me just remind you of that. Direct  
14 evidence is that which you can see directly. For  
15 example, if there is a window in this courtroom  
16 looking out and you see it is raining.  
17 Circumstantial evidence is given equal value. You  
18 may consider circumstantial evidence as well as  
19 direct evidence. And circumstantial evidence is if  
20 we're in this courtroom and there is no window to  
21 the outside but we hear thunder, the door opens,  
22 and a woman comes in. She's in a raincoat. She's  
23 dripping water. She's holding an umbrella that's  
24 dripping water, and she shakes it off.

25 In both instances you know that it is

1 raining outside. One is direct evidence, and the  
2 other is circumstantial evidence.

3 And so your finding of the aggravating  
4 circumstance of pecuniary gain may be based on  
5 tangible evidence and/or strong circumstantial  
6 evidence. You need not find that consideration for  
7 the receipt or the expectation of the receipt of  
8 the pecuniary value was the sole motivation or  
9 cause of the negligent homicide in order to find  
10 that this circumstance exists. You don't have to  
11 find that this was his sole motivation, just that  
12 it was part of his motive, cause or impetus for the  
13 offense.

14 However, the existence of a pecuniary  
15 motive at some point during the events surrounding  
16 the negligent homicide is not enough to establish  
17 this aggravating circumstance. There must a  
18 connection between the motive and the killing.

19 Let me give you an example, ladies and  
20 gentlemen. What if Mr. Ray was just doing a sweat  
21 lodge in his backyard and nobody paid him for it  
22 and three people died? That would not carry an  
23 element of pecuniary gain.

24 Here, however, Mr. Ray's conduct in  
25 making his lodge so extreme was motivated by making

1 the participants feel like they got their money's  
2 worth. For \$10,000 they needed to feel like they  
3 got something. What they got was this extreme  
4 event, the event which causes the death of the  
5 three victims.

6 Follow the money. Mr. Ray's motive and  
7 impetus for this extreme event was money. Ask  
8 yourselves what was he selling, and how did he get  
9 the participants to do what he wanted?

10 The evidence in this case has shown that  
11 Mr. Ray's conduct was motivated or that his impetus  
12 was pecuniary gain, creating this extreme event so  
13 that people thought they got something for their  
14 money.

15 The defense talked to you about this  
16 unique position of trust and suggested to you that  
17 it's like a foster parent to a foster child or in  
18 sex crimes cases where a defendant has special  
19 access to a victim. Again, that is not in your  
20 jury instructions.

21 The unique position of trust is not  
22 limited to a sex crimes case or a foster parent to  
23 a foster child. It pertained whenever the victims  
24 have placed their trust in a defendant in  
25 nonordinary circumstances. We've had four months

1 of testimony about that unique position of trust  
2 that Mr. Ray held for the three victims in this  
3 case.

4 The defense implied to you somehow that  
5 you needed to find that the families suffered more  
6 emotional harm than they would from the death of a  
7 victim under normal circumstances. That's not in  
8 your instructions either. There is no requirement  
9 that you find somehow that this suffering is above  
10 and beyond what somebody suffers when they lose a  
11 loved one. You heard plenty of evidence about the  
12 grief, the tragedy, the shock and how family's  
13 continue to struggle with that today.

14 Rely on your jury instructions, ladies  
15 and gentlemen, when you go back to deliberate,  
16 whether or not the evidence has shown beyond a  
17 reasonable doubt that these three aggravating  
18 circumstances exist with respect to each of the  
19 three counts.

20 This case is about money, trust and  
21 greed. It's about pecuniary gain. It's about the  
22 unique position of trust that Mr. Ray had with each  
23 victim, and it's about this unspeakable greed the  
24 family's still deal with today.

25 Thank you.

1 THE COURT: Thank you, Counsel.

2 As I indicated at the start, the  
3 alternates have already been selected. Jurors  
4 No. 7, and 8, you remain the alternates. While you  
5 are physically excused from your service as a juror  
6 at this time, there remains a possibility you may  
7 be called back to court to deliberate should one of  
8 the other jurors be unable to do so. So the  
9 bailiff will retain your notes and notebooks for  
10 your use if you are called back.

11 The admonition -- the admonition  
12 continues to apply to you. Please do not discuss  
13 this case with anyone or let anyone talk to you  
14 about it until someone from my office notifies you  
15 a verdict has been reached.

16 Lunch has been ordered, so if any of you  
17 will have that. And you just need to stay in touch  
18 with Ms. Rybar or my JA to make sure we know how to  
19 reach you if necessary. You can stay here if you  
20 wish. But you can't have your own personal  
21 deliberation or something like that. The  
22 admonition continues to apply to you.

23 Ms. Rybar, I'm going to ask that you step  
24 forward and be sworn for this deliberation as well.

25 (Whereupon, the bailiff was sworn by the

1 clerk.)

2 THE COURT: Do the attorneys have anything  
3 they want of record prior to deliberations?

4 Ms. Polk?

5 MS. POLK: No, Your Honor.

6 THE COURT: Mr. Kelly?

7 MR. KELLY: I have one thing out of the  
8 presence.

9 THE COURT: Okay. Please step forward.

10 MR. KELLY: I don't want to delay the jury.

11 THE COURT: Oh. Okay. Then prior to it  
12 excusing.

13 Ladies and gentlemen, you may now go to  
14 the jury room and deliberate. Take your notes and  
15 notebooks with you.

16 Thank you.

17 (The jury is excused to deliberate.)

18 THE COURT: Mr. Kelly.

19 MR. KELLY: Judge, I just wanted to wrap up or  
20 conclude the issue I raised yesterday morning in  
21 regards to Keith Evans. I believe, as Ms. Polk  
22 indicated she would do, she made a contact and has  
23 some information in that regard.

24 THE COURT: Ms. Polk.

25 MS. POLK: Your Honor, Mr. Evans is an

1 employee in my office.

2 THE COURT: And, Counsel, I read the --

3 Ms. Polk, you received a copy yesterday?

4 MS. POLK: Yes.

5 THE COURT: I had it. I told the parties I  
6 did read that. I didn't read the last two pages  
7 when it got into the various comments. I noted  
8 that there were some comments in there about the --  
9 another case, specifically the DeMocker matter.

10 And so I will inform the attorneys.

11 Well, the county attorneys here. I'll inform all  
12 the attorneys in that case that I have seen that on  
13 that document. But I've seen -- I've seen it, and  
14 Ms. Polk has verified the information.

15 Mr. Kelly.

16 MR. KELLY: Judge, what I wanted the record to  
17 reflect is that Keith Evans is employed by the  
18 Yavapai County Attorney's Office. He is the author  
19 of this comment. And it's further my understanding  
20 that he used his home computer to make that  
21 comment. And that's what I wanted to put on the  
22 record. That's what I was told yesterday by  
23 Ms. Polk.

24 MS. POLK: And, Your Honor, that is the  
25 information we received as well, that Mr. Evans

1 authored that comment at home, not during business  
2 hours, on his home computer.

3 THE COURT: Mr. Kelly, does that change your  
4 position somehow from what you stated yesterday?

5 MR. KELLY: No. The problem is yesterday we  
6 were speculating as to who Keith Evans was. I  
7 think now the record is complete.

8 THE COURT: Okay. That's a matter that does  
9 need to be addressed, in my estimation. I think it  
10 is a serious matter. It needs to be addressed  
11 further. Now is not the time.

12 MR. KELLY: Correct.

13 MS. POLK: And, Your Honor, just to clarify,  
14 the issue with respect to the integrity the of the  
15 trial, the jury has been admonished. No juror has  
16 come forward to suggest somehow that they saw that  
17 comment. When the Court talks about addressing it,  
18 I assume you are talking about something separate  
19 from the integrity of the trial itself.

20 THE COURT: I am. Yes. I don't have an  
21 indication that the jury somehow violated the  
22 admonition and became tainted by that remark. I  
23 don't believe that happened.

24 Does the defense have any indication of  
25 something like that?

1 MR. KELLY: I have no evidence that anyone on  
2 the jury saw this comment.

3 THE COURT: And, of course, that's always a  
4 risk. Who knows. I would not know what all could  
5 be out there. Speculate.

6 But, Ms. Polk, I agree. I don't see -- I  
7 haven't seen any indication that that specific item  
8 impacted the trial. But it's got other very, very  
9 serious issues connected with it.

10 MS. POLK: And, Your Honor, I do have another  
11 brief matter, if I may?

12 THE COURT: Yes.

13 MS. POLK: The defense had raised an objection  
14 to the clips. We took the break. The state  
15 provided a CD with the clips on them. My  
16 understanding is that the defense withdrew that  
17 objection. But I don't believe there is a record  
18 of that if, in fact, they've withdrawn the  
19 objection.

20 THE COURT: Thank you, Ms. Polk. I did want  
21 that on the record. That was the briefing I got  
22 from Ms. Rybar, essentially. I'd asked do the  
23 attorneys need to see me, and the next thing I  
24 knew, I was coming in. So I assume they did not  
25 need to see me. I do want the record clear on

1 that.

2 Mr. Kelly.

3 MR. KELLY: Judge, what we did just to  
4 facilitate the continued jury trial is simply made  
5 a rough count of the number of clips played during  
6 Ms. Polk's opening. And that appeared to match  
7 Exhibit 734. That's all we've done. We were going  
8 to actually look at it further with more time.  
9 Once we realized that there were approximately 20  
10 clips, that's when I told the bailiff that we were  
11 ready to go.

12 THE COURT: And I wanted to address that, any  
13 further legal problem. And I assume that it had  
14 been resolved.

15 I am going to tell you this: I have  
16 informed the clerk's office, supervising clerk.  
17 Our clerk present here today I don't think knows  
18 this yet. But I am asking for preservation of the  
19 FTR in this matter at this time. Apparently it  
20 goes all the way back to the beginning. And that's  
21 not necessarily the case. I don't know what the  
22 usual turnaround time is. But I think all of the  
23 FTR Gold is still available. And I'm ordering it  
24 be preserved at this time all the way back.

25 Thank you.

1 (Recess.)

2 THE COURT: The record will show the presence  
3 of Mr. Ray and the attorneys. There is a jury  
4 question. I put a couple of copies on each of the  
5 tables. And I have my proposed answer. If  
6 somebody will help me out, give one to the state  
7 table too.

8 I think at this point that's the answer  
9 that should be given. It's, basically, taken from  
10 the instruction, to apply the ordinary meaning.  
11 But I want to hear from the parties.

12 Ms. Polk.

13 MS. POLK: Your Honor, the state agrees.

14 THE COURT: Mr. Kelly.

15 MR. KELLY: Judge, I believe the jury question  
16 exemplifies the error in providing this aggravating  
17 factor to this jury, as argued by Ms. Seifter a  
18 couple days ago. And we would submit on the record  
19 that the proper remedy right now, given this  
20 question, is to strike that particular aggravator  
21 from this proceeding.

22 THE COURT: We had quite a discussion about  
23 what -- what -- so this question is really  
24 anticipated. And that's unfortunate. Talked about  
25 other language, not calling it "unique," putting in

1 abuse and other things.

2 Ms. Polk, essentially, a motion just to  
3 strike this particular aggravating circumstance at  
4 this time. It's clear the jury doesn't feel they  
5 have sufficient guidance to come up with a  
6 meaningful decision. Well, that's one suggestion  
7 from this anyway. I'd like to hear from you again,  
8 of course.

9 MS. POLK: Your Honor, I think that would be  
10 reading far too much into this question. It's not  
11 out of the ordinary to have a jury ask for  
12 definition of words. And it's not out of the  
13 ordinary to send back the response that this court  
14 has drafted, which is that you are to rely on the  
15 ordinary meaning of this word. That happens -- as  
16 we all know, it's not unusual for that to happen.

17 As the Court just pointed out, the  
18 defense had the opportunity to strike the word  
19 "unique," to substitute the word "abuse." There  
20 were other opportunities. And the defense elected  
21 to stay with this language. And I would ask that  
22 the Court deny this motion to strike and simply  
23 send this language back to the jury.

24 THE COURT: I don't know that that language  
25 really would have helped.

1 Mr. Kelly, anything further for the  
2 record?

3 MR. KELLY: Judge, we didn't allege this  
4 aggravator. It's the government's obviously.  
5 Again, we've objected as argued by Ms. Seifter  
6 yesterday morning. And I have made a motion to  
7 strike. I've made the record.

8 Thank you.

9 THE COURT: It's the kind of question I think  
10 might have come back if the standard applying to a  
11 violation of the degree of care, standard of care,  
12 wasn't provided. The additional specific language  
13 out of the case was provided.

14 And this is a similar thing. It's  
15 presenting a legal matter to them, in essence, and  
16 not giving them a definition. Ms. Polk is correct.  
17 A number of times the jury will want a word  
18 defined. Those instances don't seem to be as  
19 fundamental as the situation presented here. I'm,  
20 going to give them this instruction and -- I'm  
21 sorry. The answer. I'm going to give them,  
22 essentially, just repeating the instruction from  
23 the jury instructions that were originally given.

24 Thank you.

25 (Recess.)

1 THE COURT: The record will show the presence  
2 of Mr. Ray and the attorneys. The jury has  
3 indicated to the bailiff they want to go home. So,  
4 of course, that's what will happen. They will be  
5 in in just a minute.

6 I am going to say something to them about  
7 the admonition. Heidi indicated as she was  
8 shutting the door, she heard the word "dictionary."  
9 So there will be a reminder about the admonition.

10 I will stay here, and the jury should be  
11 in momentarily. We'll stand when the jury enters.

12 (Proceedings continued in the presence of  
13 jury.)

14 THE COURT: The record will show that the jury  
15 has now joined Mr. Ray and the attorneys.

16 And, ladies and gentlemen, consistent  
17 with the schedule you had suggested in the first  
18 deliberation, you want to stop at 4:30, and that's  
19 fine. So we will recess for the evening.

20 I'm going to say a word about the  
21 admonition. I'll just mention that I guess as  
22 Heidi was shutting the door, leaving, after you  
23 told her that you did want to retire for the day,  
24 she heard the word "dictionary" mentioned.

25 Ladies and gentlemen, you cannot consult

1 a dictionary in any form, either a computer,  
2 internet, Webster's Collegiate. You can't do it.  
3 You can't, obviously, talk to somebody else about  
4 what do you think this means or anything like that.  
5 It's to you now. The case is to you.

6 You can only discuss it among yourselves  
7 when you're all together deliberating under the  
8 bailiff's watch, if you will. You can't have  
9 submeetings or anything like that, can't consult  
10 any kind of source. All the other parts of the  
11 admonition continue to apply. So you will be  
12 excused for the evening.

13 And, Juror No. 10, the foreman, do you  
14 want to start at 9:00?

15 JURY FOREMAN: Yes, sir. We do.

16 THE COURT: Be assembled at 9:00 o'clock.

17 And, again, do not start deliberations until  
18 everyone -- all 12 of you are present. You are  
19 excused for the evening.

20 Thank you.

21 (Proceedings continued outside presence  
22 of jury.)

23 The jury has left the courtroom.

24 Counsel, anything further this afternoon?

25 Ms. Polk?

1 MS. POLK: No, Your Honor.

2 THE COURT: Mr. Kelly?

3 MR. KELLY: No, Judge.

4 THE COURT: Thank you. We'll be in recess.

5 (Pause in proceedings.)

6 MR. KELLY: Judge, I just noticed that the  
7 alternate juror -- I don't know her number. I have  
8 to count the seats. Juror No. 8.

9 THE COURT: Right.

10 MR. KELLY: Was present in the courtroom.

11 THE COURT: What -- for my discussion. And I  
12 have -- someone said -- had asked when the verdict  
13 returns. Sure. The person can be there at that  
14 time. But I wouldn't have had the person here  
15 prior to that. There was that brief discussion I  
16 had with you before. There wasn't any discussion  
17 of the substance or anything.

18 But, Mr. Kelly, I appreciate -- I didn't  
19 notice that because I wouldn't have the alternate  
20 in the court proceedings at all. But I do think  
21 the alternate can be here for when the verdict is  
22 read.

23 MR. KELLY: And the other thing we've noticed  
24 throughout the course of the afternoon, and, of  
25 course, everyone is kind of hanging out in the

1 hallway waiting. And that same alternate was  
2 seated by the victim's advocate and the victims  
3 down the hall reading a book.

4 THE COURT: I can't address these things if  
5 people don't tell me. I mean, I would certainly  
6 let Ms. Rybar know to keep the other jurors away.  
7 She's with them all the time. When she's away,  
8 I've got to know. And I can have Diane or somebody  
9 address that. But --

10 MR. KELLY: I don't think it's an issue unless  
11 she was called to serve. But perhaps we can all be  
12 a little more attentive.

13 THE COURT: I will speak to Heidi when she  
14 comes back. To the extent she can watch that. She  
15 can only watch that other juror when she's near the  
16 actual 12 people.

17 Ms. Polk, any suggestion on that?

18 MS. POLK: Your Honor, perhaps Ms. Rybar could  
19 request that the alternate wait downstairs instead  
20 of upstairs.

21 THE COURT: That would be some help. They  
22 take the breaks down there. To keep totally  
23 segregated from everybody involved in the trial is  
24 important.

25 And the clerk just requested that I make

1 the order clear that I'm going to leave the  
 2 exhibits in the jury room and not disturb them.  
 3 Not bring them all back in. That's ordered.

4 Thank you.

5 (The proceedings concluded.)

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1 STATE OF ARIZONA )  
 2 COUNTY OF YAVAPAI ) ss: REPORTER'S CERTIFICATE

3

4 I, Mina G Hunt, do hereby certify that I  
 5 am a Certified Reporter within the State of Arizona  
 6 and Certified Shorthand Reporter in California.

7 I further certify that these proceedings  
 8 were taken in shorthand by me at the time and place  
 9 herein set forth, and were thereafter reduced to  
 10 typewritten form, and that the foregoing  
 11 constitutes a true and correct transcript.

12 I further certify that I am not related  
 13 to, employed by, nor of counsel for any of the  
 14 parties or attorneys herein, nor otherwise  
 15 interested in the result of the within action.

16 In witness whereof, I have affixed my  
 17 signature this 5th day of July, 2011

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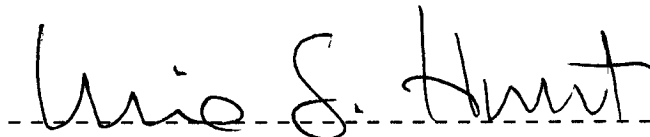
1 STATE OF ARIZONA       )  
2 COUNTY OF YAVAPAI     )     ss: REPORTER'S CERTIFICATE

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